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QUESTION PRESENTED

Amici will address the following question:

Whether the government's three "defenses" to respondents' breach of contract claims, even if accepted by the Court, fail to defeat a claim based on the distinct theory of frustration of purpose.

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BRIEF OF *AMICI CURIAE*
TRINITY VENTURES, LTD.
AND CASTLE HARLAN, INC.
IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*[*]

A. Interest of Trinity Ventures, Ltd.

Trinity Ventures, Ltd. ("Trinity") is the lead plaintiff in the only other *Winstar*-related case presently pending before a federal appellate court. In that case, the district court has entered a $26.6 million judgment in plaintiffs' favor based on a legal theory -- frustration of purpose -- distinct in many important respects from the breach of contract claims presented here. *Far West Fed. Bank, S.B.* v. *Director, OTS*, 787 F. Supp. 952, 955-56 (D. Or. 1992), *appeal docketed sub nom., Trinity Ventures, Ltd., et al.* v. *FDIC*, Nos. 92-35597, 92-36535 (9th Cir.).

In 1987, Trinity and a number of other investors were "encouraged by the Federal Home Loan Bank Board ('FHLBB') and its deposit insurance arm the Federal Savings and Loan Insurance Corporation ('FSLIC')" to recapitalize Far West Federal Bank, S.B. ("Far West"), an "essentially insolvent" thrift in Portland, Oregon, with approximately $26.6 million cash. *Far West Fed. Bank, S.B.* v. *Director, OTS*, 930 F.2d 883, 885 (Fed. Cir. 1991). This investment was made in exchange for *explicit* promises from the government regarding the capital requirements to be

[*] Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

applied to Far West for a specified period of time "notwithstanding any subsequent changes" in how the standard thrift capital requirements might be defined.

The express promises made to Far West's investors were abrogated by the enactment of the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), No. 101-73, 103 Stat. 86 (1989). Application of FIRREA's stringent new capital standards to Far West resulted in the government's seizure of Far West and its confiscation of plaintiffs' $26.6 million cash investment. After extensive litigation (including intervening decisions by the Federal Circuit and the Ninth Circuit), the district court held that the enactment and implementation of FIRREA frustrated the central purpose of the parties' contract and, accordingly, granted rescission of the contract and an award of restitution to the investors "in an amount equal to their cash investment in Far West" of $26.6 million. 787 F. Supp. at 960-63. A decision in *Trinity Ventures* has been deferred by the Ninth Circuit pending appellate review in *Winstar*.

B. Interest of Castle Harlan, Inc.

Much like the situation in *Trinity Ventures*, in December 1988 a group of private investors led by Castle Harlan, Inc. ("Castle Harlan") were induced by FHLBB and FSLIC to recapitalize Western Empire Savings and Loan Association ("Western Empire"), an insolvent thrift located in California, with approximately $15 million in cash. This investment was made in exchange for the government's promises, *inter alia*, that Western Empire would be subject for a period of at least five years to specific "modified capital requirements" rather than the standard capital requirements applicable to thrifts, and could hold certain percentages of its assets in specific types of investments. These promises, which were the result of extensive negotiations, are expressly set forth in a written agreement signed by the parties.

The enactment of FIRREA likewise abrogated the specific contractual promises made to the Western Empire investors, including the promise that Western Empire could operate under the modified capital requirements negotiated by the parties. The government instead applied the new FIRREA capital requirements to Western Empire, and because the thrift could not meet those requirements the government seized the thrift and placed it into receivership in February 1990. Thus, less than 14 months after it induced plaintiffs to invest $15 million in Western Empire, the government confiscated that $15 million cash investment to the government's own use.

The Western Empire investors have brought suit in the United States Court of Federal Claims, alleging breach of contract, frustration of purpose and Fifth Amendment takings claims. *Castle* v. *United States*, No. 90-1291C (Ct. Fed. Cl. filed Sept. 25, 1990). The *Castle* suit has been stayed pending this Court's decision in the present case.

SUMMARY OF ARGUMENT

1. The complaints in the cases before this Court, like the complaints filed by *amici*, allege three principal causes of action: (1) breach of contract, (2) frustration of purpose, and (3) violation of the takings and due process clauses of the Fifth Amendment. In the present case the courts below found for the plaintiffs on the breach of contract claim, without reaching the other two causes of action, and held that the plaintiffs are entitled to recover damages for that breach.

The government asserts three defenses to respondents' breach of contract claim: (1) the "unmistakability doctrine"; (2) the government agencies' supposed lack of authority to enter into the contracts involved here; and (3) the sovereign acts doctrine. For the reasons stated in respondents' briefs, those arguments should be rejected. Even if the Court were to conclude that one or more of the government's defenses barred recovery for breach of contract, however, those defenses would *not* defeat a claim based on frustration of purpose for the reasons discussed herein.[1] Should the Court rule in the government's favor on this appeal, therefore, its opinion should make clear that such a decision does not preclude a claim based on the frustration of purpose doctrine.

2. It is black-letter contract law that, where a principal purpose of a contract is substantially frustrated by a supervening event that the parties had assumed would not occur, a party is entitled to obtain rescission of that contract and restitution of any consideration paid to or benefits bestowed upon the other party. The only two courts that have addressed such "frustration of purpose" claims in *Winstar*-related cases have held that the enactment of FIRREA was a supervening event frustrating a central purpose of the parties' contracts, thus entitling the plaintiffs to rescission and restitution.

3. The so-called "unmistakability doctrine" is irrelevant to the frustration of purpose claims because, even accepting the United States' characterization of that doctrine, it only pertains to "the interpretation of promises made in a con-

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[1] Nor would those defenses defeat a claim based on the Fifth Amendment, as explained in a separate *amicus* brief filed by AmBase Corporation and Carteret Bancorp.

tract." Pet. Br. at 11 (emphasis omitted). To recover for frustration of purpose, the party seeking relief need demonstrate only that a supervening event substantially frustrated a principal purpose of the contract, quite apart from whether any terms of the contract were violated. Consequently, it does not matter whether FSLIC and FHLBB *promised* in "unmistakable terms," or at all, that the thrifts would not be subject to any new legislation imposing regulatory capital requirements contrary to those in force at the time the parties' agreement was negotiated. What matters is only that the parties *assumed* at the time the contracts were made that no such legislation would be enacted.

Put slightly differently, it is not necessary for the government to have promised, in "unmistakable" or any other terms, to bear the risk of such subsequent legislation. The plaintiffs need only establish that the contract does not expressly allocate the risk of the supervening event's occurrence to either party, and hence the *absence* of language "expressly allocating" this risk to *plaintiffs* is enough to establish a right to recover for frustration of purpose. The unmistakability doctrine thus does not even come into play.

4. The government's argument that FSLIC and FHLBB acted without proper authority in entering into contracts with respondents (Pet. Br. at 36-43) also is irrelevant to a claim for rescission and restitution based on the frustration of purpose doctrine. Even were the government correct, it would follow as a matter of course that a plaintiff would be entitled to rescission and restitution. As this Court has recognized, it is a fundamental equitable principle that rescission and restitution are proper remedies for an *ultra vires* contract in which a party without proper authority obtains money or property of others.

5. Finally, as the government has *expressly* conceded, the sovereign acts doctrine likewise cannot defeat a frustra-

tion of purpose claim. A private party's duty to render performance is discharged, and hence the party cannot be liable for contract damages, when the enactment of a statute precludes performance. The government contends that the sovereign acts doctrine applies the same rule to the government under the circumstances of this case. Even if this were so -- which it is not -- it would not defeat a frustration of purpose claim. As the government recognizes, the situation where a party's performance is rendered impossible by subsequent legislation is a classic circumstance for granting rescission and restitution to the other side under the frustration of purpose doctrine.

ARGUMENT

The issue directly presented to this Court is a narrow one: whether any of three specific defenses asserted by the government defeat the breach of contract claims brought by respondents. Respondents' breach of contract claims, however, are only one of several theories of recovery alleged in their complaints. Respondents (as well as *amici* in their lawsuits) also allege claims for frustration of purpose, and for violation of the takings and due process clauses of the Fifth Amendment. These claims were not reached by the courts below.[2]

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[2] The Federal Circuit's *en banc* majority opinion did not reach the frustration of purpose or Fifth Amendment claims because it concluded that respondents were entitled to recover for breach of contract. The two dissenting judges, while rejecting the breach of contract claims, left open the possibility of finding liability on a different theory. *See* Pet. App. at 47a ("In my view, the plaintiffs can assert only a claim for an alleged taking of their property by the legislation, a claim which remains to be litigated.") (Nies, J., dissenting); *id.* at 49a ("I believe that the sovereign acts doctrine is a barrier to the thrifts' recovery under the breach of contract theory.") (Lourie, J., dissenting). As noted *infra*, the government concedes that the sovereign acts doctrine is *not* a "barrier" to recovery under either a frustration of purpose or takings theory.

The purpose of this brief is to address the frustration of purpose doctrine, and in particular to explain why *none* of the three "defenses" asserted by the government with respect to respondents' breach of contract claims -- even if accepted by this Court -- would defeat a frustration of purpose claim. The government has conceded this with respect to its sovereign acts defense, and for the reasons discussed below the same conclusion must be reached with respect to the government's "unmistakability doctrine" defense as well as its defense that the agencies who entered into contracts with respondents allegedly lacked the authority to do so. Accordingly, in the event that the Court rules in the government's favor on the breach of contract claims, it should make clear that its decision does not preclude a claim based on frustration of purpose.

A. As the Only Two Courts to Address the Issue Have Held, An Award of Rescission and Restitution Under the Frustration of Purpose Doctrine Is Appropriate Where FIRREA Frustrated A Primary Purpose of the Parties' Agreement

Under the frustration of purpose doctrine, a party is entitled to obtain rescission of a contract, and restitution of any consideration and benefits rendered to the other party, in the event that a "primary purpose" of the contract "has been destroyed by a supervening event that the parties assumed would not occur." *RTC* v. *FSLIC*, 25 F.3d 1493, 1503 (10th Cir. 1994). *See also West Los Angeles Institute for Cancer Research* v. *Mayer*, 366 F.2d 220, 223 (9th Cir. 1966) (frustration of purpose doctrine applicable when

"through a supervening circumstance for which neither party is responsible, a thing, event or condition which was essential so that performance would yield to the promisor the result which the parties intended him to receive, fails"), *cert. denied,* 385 U.S. 1010 (1967); 6 Arthur L. Corbin, *Corbin on Contracts* § 1353, at 496 (1962); 2 George E. Palmer, *The Law of Restitution* § 7.1, at 101 (1978); 12 Samuel Williston & Walter E. Jaeger, *A Treatise on the Law of Contracts* § 1454, at 5 (3d ed. 1970).

According to the Restatement, rescission of a contract and an award of restitution are appropriate under the frustration of purpose doctrine when (1) the supervening event frustrates a "principal" purpose of the contract, meaning one that is "so completely the basis of the contract that, as both parties understood, without it the transaction would make little sense"; (2) the frustration is "substantial"; and (3) the "non-occurrence of the frustrating event" was "a basic assumption on which the contract was made." RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (1980). *See also* 6 Corbin, *supra*, § 1353-1361; 2 E. Allan Farnsworth, *Farnsworth on Contracts* § 9.7 (1990).

A claim for frustration of purpose is fundamentally different in nature from a claim for breach of contract. To recover for frustration of purpose it is not necessary to show that the other party breached any contractual obligations; rather, the focus of the inquiry is whether a principal purpose of the contract has been frustrated *regardless of fault by either party* due to an event that, in entering into the contract, the parties assumed would not occur. Further, a party seeking to recover for frustration of purpose need not establish that the other party agreed to bear the risk of such an event; it only must show that "the contract does not expressly allocate the risk of the [supervening] event's occurrence to either party." *United States* v. *General Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377, 381 (2d Cir. 1974).

Consistent with the fact that neither side need be at fault for the frustration of purpose doctrine to apply, the monetary remedy available on a frustration of purpose claim is more limited than that available for breach of contract. In a breach of contract case, the plaintiff normally obtains "benefit-of-the-bargain" damages, measured by what the plaintiff would have received had the contract not been breached. *E.g.*, 3 Farnsworth, *Farnsworth on Contracts*, § 12.1, at 147-48 (1990); 12 Williston & Jaeger, *supra*, § 1454, at 2-3. In appropriate circumstances, a plaintiff may choose the alternative remedy of rescission and restitution. *E.g.*, 3 Farnsworth, *supra*, § 12.1, at 150-51; 12 Williston & Jaeger, *supra*, § 1454, at 3-4. With respect to a frustration of purpose claim, however, the only available remedies are rescission of the parties' contract, discharge of the parties' duties of further contractual performance, and an award of restitution to one or both parties. *E.g.*, 6 Corbin, *supra*, §§ 1353, 1361, at 496; 2 Palmer, *supra*, § 7.1.

Two courts have addressed the frustration of purpose doctrine in *Winstar*-related cases, and both concluded that the plaintiffs were entitled to prevail on a frustration of purpose claim and to obtain an award of rescission and restitution. In *RTC* v. *FSLIC*, the investor plaintiffs had made a $6 million cash investment in a troubled thrift based on the government's agreement that the thrift could include supervisory and regulatory goodwill in the calculation of its regulatory capital. FIRREA abrogated this agreement, and the investors brought suit to rescind the contract. The district court granted plaintiffs rescission and restitution in the amount of their $6 million investment, and the Tenth Circuit affirmed the award on frustration of purpose as well as breach of contract grounds. With respect to the frustration of purpose claim, the Tenth Circuit held that "the primary purpose of the . . . transaction with FSLIC and FHLBB was to acquire and operate profitably a savings and loan

association within the regulated thrift industry," and that "[a]pplication of FIRREA's capitalization requirements . . . made it impossible for the . . . [acquirers] to fulfill their contract duty to operate the thrift in compliance, thus totally frustrating their purpose" in entering into agreements to acquire the thrifts. 25 F.3d at 1503.

Similarly, in *Trinity Ventures* the district court entered summary judgment for the investor plaintiffs on a frustration of purpose claim. The facts of *Trinity Ventures* are compelling. In 1987, those investors -- who were sought out by the government, which was actively looking for private investors to recapitalize insolvent thrifts -- agreed to contribute $26.6 million in cash to Far West as part of a heavily negotiated agreement with federal regulators. That agreement provided, *inter alia*, that (a) Far West would be permitted to operate for ten years under a capital schedule providing for gradually more stringent capital requirements, and (b) in calculating Far West's regulatory capital for purposes of the agreed capital schedule, "the components of [Far West's] 'regulatory capital' will be as defined [under then-effective insurance regulations] *notwithstanding any subsequent changes in the definition of regulatory capital*." 787 F. Supp. at 955 (emphasis in original).

In *Trinity Ventures* the chief negotiator *for the government* acknowledged in sworn testimony that "[i]t was my clear understanding that the government was entering into a binding contract, and that the ability of the Investors and Far West to rely on the government's contractual promises . . . [was] essential to the Investors' completing the [transaction]." Similarly, the lawyer *representing the government* in the transaction testified that the purpose of the contractual provision stating that the negotiated capital schedule would remain in place "notwithstanding any subsequent changes in the definition of regulatory capital" was to assure the Far West investors "that as long as they met their [modified

capital] schedule, that they didn't have to worry about anything else, that they were protected." *Trinity Ventures*, *supra*, Supplemental Excerpt of Record at 396, 413. FIRREA abrogated this promise -- and the central purpose of the parties' agreement -- with the result that the government seized Far West and thus effected a naked transfer to the government of plaintiffs' $26.6 million cash investment (as well as obtaining the benefit of further improvement in Far West's condition that resulted from plaintiffs' efforts over several years).

The district court had no trouble granting plaintiffs summary judgment on their frustration of purpose claim, holding that "[t]he government, no less than plaintiffs, intended that the promises specified in the [parties' agreement] would be kept. The non-occurrence of an event which would prevent the government from honoring its obligations under the [parties' agreement] (e.g., the enactment of new banking laws inconsistent with the contract) was therefore a basic assumption of the parties in creating the contract." Because this assumption was substantially frustrated by FIRREA, the plaintiffs were entitled to rescission and restitution under the frustration of purpose doctrine. 952 F. Supp. at 960-61.[3]

Under well-established principles of contract law, a contract between private parties that has been frustrated or rendered impossible of performance by an Act of Congress

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[3] The facts in *Castle* v. *U.S.* are similar, including the government's agreement to permit Western Empire to operate for a specified period of time according to modified capital standards negotiated between the parties. FIRREA's abrogation and frustration of the parties' agreement, and the resulting seizure of Western Empire, likewise effectively resulted in the government's confiscation of the $15 million in cash the *Castle* plaintiffs had contributed to Western Empire. *See Castle*, *supra*, Complaint ¶¶ 29-62.

may be rescinded and restitution awarded. *See, e.g., Winton* v. *Amos*, 255 U.S. 373, 393 (1921); *New York Central and Hudson River R.R. Co.* v. *Gray*, 239 U.S. 583, 587 (1916); *Louisville & Nashville R.R. Co.* v. *Crowe*, 160 S.W. 759 (Ky. 1913); 6 Corbin, *supra*, § 1368, at 519-520; RESTATEMENT (SECOND) OF CONTRACTS § 272(1) and cmt. b (1981); *cf. West Los Angeles Institute for Cancer Research*, 366 F.2d at 223 (rescission warranted where supervening Internal Revenue Service ruling resulted in a "commercial frustration" of a contract and the "supervening impossibility of [the contract's] performance"), *cert. denied*, 385 U.S. 1010 (1967); *Walker* v. *Continental Life & Accident Co.*, 445 F.2d 1073 (9th Cir. 1971) (rescission and restitution awarded where Supreme Court ruling resulted in "commercial frustration" of contract). When the United States is a party to a contract whose performance has been frustrated by a federal statute such as FIRREA, the result is all the more clear. *See RTC v. FSLIC*, 25 F.3d at 1503.

As the foregoing discussion indicates, the conclusions in *RTC* v. *FSLIC* and in *Trinity Ventures* that the plaintiffs are entitled to rescission and restitution are grounded on a straightfoward application of the frustration of purpose doctrine. In those *Winstar*-related cases where the plaintiffs can establish that FIRREA substantially frustrated a principal purpose of the plaintiffs' agreement with the government and that the "non-occurrence" of FIRREA was a basic assumption on which the contract was made, the frustration of purpose doctrine thus provides an alternative basis for the plaintiffs to recover.

B. The Three "Defenses" Asserted By the Government to Respondents' Breach of Contract Claims, Even If Accepted By the Court, Would Not Defeat a Claim Based on Frustration of Purpose

1. The "Unmistakability Doctrine" Does Not Bar Rescission and Restitution for Frustration of Purpose

The government asserts that respondents' breach of contract claims "depend on the proposition that the federal thrift regulators entered into contracts that committed the government to follow certain regulatory policies for 25 to 40 years into the future, and that Congress then violated those commitments by enacting [FIRREA]." Pet. Br. at 22. Relying on the so-called "unmistakability doctrine," the government states that "the documents relied upon by respondents to reach that unusual result should not be construed to contain such contractual commitments unless agreements to that effect were expressed with unmistakable clarity." *Id.* The government then goes on to conclude that "the contracts at issue in this case did not purport to make any promises by the government concerning whether supervisory goodwill would continue to be treated as regulatory capital in the future." *Id.* at 36.

As respondents' briefs explain, the government's "unmistakability doctrine" defense rests on erroneous interpretations of both the parties' contracts and the unmistakability doctrine itself. Even were the Court to accept the government's arguments, however, and conclude that respondents' contracts did not "unmistakably" establish the existence of government promises regarding the regulatory

capital treatment of supervisory goodwill, this would not affect the merits of a frustration of purpose claim.[4]

According to the government, the unmistakability doctrine "governs the interpretation of the promises made in a contract." *Id.* at 11 (emphasis omitted). Application of the frustration of purpose doctrine, however, does not depend on the interpretation of the terms of a contract. As noted, to prevail on a frustration of purpose claim a party need not prove that the other party made any contractual promise that was breached. Rather, the party seeking relief simply must demonstrate that a supervening event substantially frustrated a principal purpose of the contract, quite apart from whether any terms of the contract were violated.

This Court has long recognized that relief may be granted under the frustration of purpose doctrine where the terms of the contract do not explicitly address the effect of the supervening event. As the Court observed,

> It long has been settled in the English courts and in those of this country, federal and state, that where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an *implied* condition that, if before the time for performance and without the default of either party the particular thing ceases to exist or be

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[4] It also would not dispose of *amici*'s breach of contract claims. As briefly discussed above, *amici* had express language in their contracts reflecting the government's promises in "unmistakable" terms, even under the government's version of the unmistakability doctrine.

> available for the purpose, the contract shall be dissolved and the parties excused from performing it.

Texas Co. v. *Hogarth Shipping Co.*, 256 U.S. 619, 629-30 (1921) (emphasis added). Thus, the frustration of purpose remedy is based upon an implied-in-fact, rather than explicit, understanding of the parties that the contract will be rescinded if a supervening event frustrates its performance.[5]

Consequently, it does not matter whether FSLIC and FHLBB *promised* in "unmistakable terms," or at all, that

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[5] Textbook examples of the frustration of purpose doctrine are the turn-of-the-century English cases involving contracts for the rent of rooms to view King Edward VIII's coronation procession. After the coronation was postponed indefinitely because of the King's operation for appendicitis, courts ordered rescission of the contracts. Notwithstanding that the owners of the rooms had made no contractual promise to the renters that the coronation procession would occur and there was no breach of the contracts by the owners, courts held that the renters who had not paid were discharged of their obligation to pay for the rooms because "the coronation procession was the foundation" of the contracts and "the object of the contract[s]" was "frustrated by the non-happening of the coronation and its procession on the days proclaimed." *Krell* v. *Henry*, [1903] 2 K.B. 740, 751, 754 (C.A.); *see also Chandler* v. *Webster*, [1904] 1 K.B. 493; *Griffin* v. *Brymer*, 19 T.L.R. 434 (K.B 1903). Although some of these so-called "coronation cases" denied restitution of moneys already paid under the rental contracts, the House of Lords overruled those decisions thirty-eight years later when it "allowed recovery of money paid in consideration of the purchase of machinery for delivery to Poland which became impossible because of World War II." 2 Palmer, *supra*, § 7.1, at 100 (citing *Fibrosa Spoka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32). In the United States, "most courts have rejected the early English view [which denied restitution] and [have] granted restitution over the whole range of cases in which impossibility or any related doctrine operates to discharge the contract obligations." *Id.*, § 7.1, at 101.

the thrifts would not be subject to any new legislation imposing regulatory capital requirements contrary to those in force at the time the parties' agreement was negotiated. What matters is only that the parties *assumed* at the time the contracts were made that no such legislation would be enacted. Put slightly differently, it is not necessary for the government to have promised, in "unmistakable" or any other terms, to bear the risk of such subsequent legislation. The plaintiff need only establish that "the contract does not expressly allocate the risk of the [supervening] event's occurrence to either party." *General Douglas MacArthur Senior Village*, 508 F.2d at 381. Hence, the *absence* of language "expressly allocating" this risk to *plaintiffs* is enough to establish a right to recover under the frustration of purpose doctrine. The unmistakability doctrine does not even come into play.

2. Even If FHLBB and FSLIC Did Not Have Authority to Enter Into the Contracts at Issue, Rescission and Restitution Would Be a Proper Remedy

The government also argues that respondents must be denied relief under their breach of contract claim because FSLIC and FHLBB lacked the statutory authority to enter into the contracts that the courts below found to exist between respondents and the government. *See* Pet. Br. at 36-43. *Amici* submit that those agencies had more than ample authority to enter into such contracts. But even if the agencies had acted without such authority, respondents would still be entitled to rescission and restitution under the precedents of this Court.

This Court has long recognized that rescission and restitution are warranted when a party to a contract -- whether it be a government agent or a private entity -- has acted in an *ultra vires* fashion in entering into the contract.

In *Marsh* v. *Fulton County*, 77 U.S. (10 Wall.) 676 (1870), the clerk of a state county court had sold bonds on behalf of the county even though the clerk "possessed no general authority to bind the county." *Id.* at 681. Concluding that the county was obligated to effect restitution of all moneys received from the purchasers of the bonds, this Court observed that "[t]he obligation to do justice rests upon all persons, natural and artificial; and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." *Id.* at 684.

Similarly, in *Citizens' Central Nat'l Bank* v. *Appleton*, 216 U.S. 196 (1910), a national bank obtained money under a guaranty contract where the guarantee given by the bank "was beyond the power of the . . . bank, under the national banking statutes." The lower court entered judgment ordering restitution and this Court affirmed, holding that the award of restitution "was consistent with sound legal principles and was intrinsically right." 216 U.S. at 205. *See also Rankin* v. *Emigh*, 218 U.S. 27, 35 (1910) ("if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation"); *Aldrich* v. *Chemical Nat'l Bank*, 176 U.S. 618, 629-35 (1900) (discussing numerous cases awarding restitution as remedy for an *ultra vires* contract); *Central Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U.S. 24, 60 (1891) ("A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.").

This Court's approach has been followed by the lower courts, which have granted restitution when a government agency has without proper authority entered into a contract with a private contractor. In these circumstances, "[w]here a benefit has been conferred by the contractor on the government in the form of goods or services, which it accepted, a contractor may recover at least on a *quantum valebant* or *quantum meruit* basis for the value of the conforming goods or services received by the government prior to the rescission of the contract for invalidity." *United States* v. *Amdahl Corp.*, 786 F.2d 387, 393 (Fed. Cir. 1986) (footnote omitted). "Even though a contract be unenforceable against the Government, because not properly advertised, not authorized, or for some other reason, it is only fair and just that the Government pay for goods delivered or services rendered and accepted under it." *Prestex, Inc.* v. *United States*, 320 F.2d 367, 373 (Ct. Cl. 1963); *see also Gould, Inc.* v. *United States*, 67 F.3d 925, 929 (Fed. Cir. 1995) ("a contractor can be compensated under an implied-in-fact contract when the contractor confers a benefit to the government in the course of performing a government contract that is subsequently declared invalid); *Urban Data Sys., Inc.* v. *United States*, 699 F.2d 1147, 1154 (Fed. Cir. 1983); *Ocean Technology, Inc.* v. *United States*, 19 Cl. Ct. 288, 293 (1990) (where government contract was invalid, court found that it "would be manifestly unfair, at this late date, for [the government agency] to retain the benefits [of the contract] and the time value of the amount due plaintiff while renouncing its contractual obligations").

If it were true that FHLBB and FSLIC lacked authority to enter into contracts regarding the capital treatment of supervisory goodwill (or contracts otherwise addressing the capital treatment to be accorded particular thrifts), this would not defeat a frustration of purpose claim. To the contrary, because rescission and restitution are accepted remedies when the other party's execution of the contract

was *ultra vires*, it would be clear that the plaintiff is entitled to recover for frustration of purpose.

3. As the Government Has Expressly Conceded, the Sovereign Acts Doctrine Cannot Defeat A Frustration of Purpose Claim

Finally, as the government has *expressly* conceded, its third defense to respondents' breach of contract claims -- the sovereign acts doctrine -- cannot defeat a frustration of purpose claim.

"Under ordinary principles of contract law, a party's duty to render performance is discharged when an intervening action by the sovereign, such as enactment of a statute, precludes performance." Pet. Br. at 43-44, *citing* 6 Corbin, *supra*, § 1343, at 417 (1962); Restatement (Second) of Contracts §§ 261, 262 (1981). The government contends that the sovereign acts doctrine "applies the same rule to the government as contractor," subject to the qualification that "the sovereign act relied upon to excuse performance be a 'public and general' one." Thus, according to the government, "the United States would not be liable *for contract damages* if the governmental act that caused the breach of [respondents] rights was 'public and general.'" *Id.* at 44 (emphasis added).

The sovereign acts doctrine does not apply to the case before this Court for the reasons set forth by respondents. Even if it were applicable, however, and barred a claim for breach of contract, it would not defeat a frustration of purpose claim. As discussed above, a party whose performance is made impossible by subsequent legislation, and is therefore excused from performance and from liability for benefit-of-the-bargain contract damages, must nonetheless pay restitution of whatever consideration and other benefits it has already received under the contract. Indeed, as

noted, the situation where a party's performance is rendered impossible by subsequent legislation is a classic circumstance for granting rescission and restitution to the other side under the frustration of purpose doctrine.

The government has conceded this point. In its Reply Brief in Support of Petition for a Writ of Certiorari, the government states that Glendale's opposition brief "correctly argues that our sovereign acts defense 'does not defeat [its] claims for a constitutional taking or for frustration of purpose, mistake or other quasi-contractual relief.'" *Id.* at 11 n.6. The government also implicitly conceded this point in *Trinity Ventures* and *RTC* v. *FDIC*, where it did not raise the sovereign acts doctrine as a defense to the plaintiffs' frustration of purpose claims. Thus, the government's final defense to respondents' breach of contract claims, even if accepted by this Court, would not bar a claim for frustration of purpose.

CONCLUSION

The judgment of the Federal Circuit should be affirmed. In the event, however, that the judgment is reversed, this Court should make clear that its decision does not preclude a claim based on frustration of purpose.

Respectfully submitted,

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